

Decision 02-05-043 May 16, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Emergency Application of
FirstWorld Orange Coast (U-5782-C) For
Authority to Transfer Customers and Terminate
Local and Interexchange Services.

Application 01-08-038
(Filed August 24, 2001)

O P I N I O N**I. Summary**

In this application, FirstWorld Orange Coast (Applicant) requests authorization to withdraw from the provision of local exchange and interexchange services, and to transfer its customers to the customer's choice of carrier. Applicant sent misleading notices to its customers that led them to believe that service would be automatically terminated after a specified date. As a result, we find that Applicant effectively withdrew from service without authorization in violation of General Order (GO) 96-A, Section XIV, and Pub. Util. Code § 702. By this order, we approve Applicant's request to withdraw from providing service.

II. Background

In Decision (D.) 97-06-037, the Commission authorized Applicant, a California corporation, to provide facilities-based and resold local exchange and interexchange service. Applicant has provided service since 1998. On August 24, 2001, Applicant filed this application requesting authority to withdraw from providing local exchange and interexchange services. At the

time the application was filed, it had seven customers all of whom were business customers. As of November 14, 2001, all of Applicant's customers had transferred to the carriers of their choice.

III. Representations of Applicant

Applicant says that its local exchange and interexchange operations are unprofitable. Therefore, Applicant requests authorization to withdraw from providing service.

Applicant provided written notice to its affected customers on August 31, 2001. The notice stated that effective September 30, 2001, Applicant would no longer be providing service in the customers' area. Applicant enclosed a list of other providers in the area, and offered its service representatives' help to assist in the transition.

IV. Notices

The notice requirements for transfers of a carrier's customer base were developed in D.97-06-096 for advice letter filings. The requirements are useful as a guide in this proceeding. They are as follows:

1. The notice must be in writing;
2. The carrier must provide the notice to customers no later than 30 days before the proposed transfer;
3. The notice must contain a straightforward description of the transfer, any fees the customer will be expected to pay, a statement of the customer's right to switch to another carrier, and a toll-free number for questions; and
4. The notice and the carrier's description of service to customers must be included in the advice letter.

Applicant provided a copy of its notice with the application. The notice was provided, in writing, more than 30 days before service was to terminate. The notice told customers to take immediate steps to transfer to another carrier, and provided a toll free phone number for questions. The notice stated that it would not charge a fee to transfer the customer to another carrier. The fourth requirement does not apply to the notice itself. Had Applicant been authorized to discontinue service on the date specified in the notice, it may have satisfied the requirements of D.97-06-096. However, this was not the case.

General Order (GO) 96-A, Section XIV, states that “No public utility of a class specified herein shall, unless authority has been obtained from the Commission, either withdraw entirely from public service or withdraw from public service in any portion of the area served.” Therefore, Applicant is required to continue to provide service until its withdrawal from service is approved by the Commission.

Applicant’s notice said that, effective September 30, 2001, Applicant would no longer be providing service in the customers’ area. The notice goes on to say; “On August 24, 2001, FirstWorld filed an application requesting approval from the California Public Utilities Commission to discontinue providing services. FirstWorld’s application is still pending at the Commission.” Applicant’s notice gave the impression that service would be automatically terminated after September 30, 2001. Therefore, we find that Applicant’s customers were misled into changing carriers. As a result, Applicant effectively withdrew from service without authorization in violation of GO 96-A, Section XIV.

Compliance with Commission directives is required of all California public utilities. Pub. Util. Code § 702 says: “Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the

Commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees.” Therefore, Applicant’s violation of GO 96-A, Section XIV is also a violation of Pub. Util. Code § 702.

V. Relinquishing the CPCN

In this application, Applicant asks to relinquish its CPCN to provide local exchange and interexchange service. There is no reason not to do so. Therefore, we will grant the request.

VI. Procedural Matters

In Resolution ALJ 176-3071 dated September 20, 2001, the Commission preliminarily categorized this application as rate setting, and preliminarily determined that hearings were not necessary. No protests have been received. There is no apparent reason why the application should not be granted. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

VII. Comments on the Draft Decision

The draft decision (DD) of the Administrative Law Judge in this matter was mailed to Applicant (there are no other parties) in accordance with Pub. Util. Code § 311(g)(1), and Rule 77.7 of the Commission’s Rules of Practice and Procedure. Applicant filed comments on March 25, 2002.

In its comments on the DD, Applicant argues that proposed restitution order is stayed by its February 15, 2002 bankruptcy filing in U.S. Bankruptcy Court for the District of Delaware. It points out that Section 362(a)(1) of the

Bankruptcy Code¹ prohibits the Commission from commencing or continuing any “judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of that case under this title.” Applicant then goes on to argue that the police and regulatory power exception under Section 362(b)(4) does not apply here. The DD orders restitution to ratepayers harmed by Applicant’s actions.

We recognize that the filing a bankruptcy petition operates as a stay applicable to all entities, of “the commencement or continuation of a judicial, administrative, or other action or proceedings against the debtor; and that the general policy behind the automatic stay is to grant complete and immediate, albeit temporary, relief to the debtor from creditors and to prevent dissipation of the debtor’s assets before orderly distribution to all creditors can be affected.” (*S.E.C. v. Brennan* (2nd Cir. 2000), 230 F3d, 65, 71.) In other words, a main purpose of the stay is to protect the priority of payments to creditors.

We also recognize that the Bankruptcy Code provides certain exceptions to the automatic stay. Section 362(b)(4) provides an exception for certain governmental police and regulatory actions. This section provides that the filing of a petition does not stay “the commencement or continuation of an action or proceeding by a governmental unit...to enforce such governmental unit’s...police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the

¹ Hereinafter, all section references are to the U.S. Bankruptcy Code, unless stated otherwise.

governmental unity to enforce such governmental unit's...police power." We understand that this provision permits a governmental unit such as the Commission to "commence or continue any police or regulatory action, including one seeking a money judgment, but it may enforce only those judgments and orders that do not require payment or authorize the government to exercise control over property of the estate." (3 Collier at 362-59 to 362-60.) This exemption allows these proceedings to continue so that the bankruptcy court does not become a "haven for wrong doers." (*Berg v. Good Samaritan Hospital* (9th Cir. 2000) 230 F.3d 1165, 1167.)

We understand that the U.S. Ninth Circuit Court of Appeals applies two tests for determining whether a state's actions falls within the scope of Section 362(b)(4): the pecuniary purpose test and the public policy test. Under the "pecuniary purpose" test, the court must determine "whether the government action relates primarily to the protection of the government's pecuniary interest in the debtor's property or to the matters of public safety and welfare. (See *Universal Life Church, Inc. v. United States of America* (9th Cir. 1997) 128 F.3d 1294, 1297.) The relevant inquiry here is whether the action is being pursued "solely to advance a pecuniary interest of the governmental unit," in which case the stay will be imposed. (*Universal Life Church, Inc. v. United States of America* (9th Cir. 1997) 128 F.3d 1294, 1297.) Such actions have been described as those that would "result in an economic advantage to the government or its citizens over third parties in relation to the debtor's estate." (*In re Charter First Mortg., Inc.*, 42 B.R. 380, 382 (Bankr. D. Or. 1984).)

Our research reveals that Courts apply the "public policy" test in order to "distinguish between government actions that effectuate public policy and those that adjudicate private rights." (*Universal Life Church, Inc. v. United States of*

America (9th Cir. 1997) 128 F.3d 1294, 1297.) This research also reveals that from the legislative history of Section 362(b)(4) and case law, it is well established that consumer protection is a valid exercise of the police and regulatory power for purposes of this section. We believe the action we are taking herein is primarily concerned with consumer protection, and that it does not conflict with any purpose of federal bankruptcy law.

We believe that a strong case can be made that the restitution order set forth in the DD falls within the exception set forth in Section 362(b)(4). However, in order to avoid unnecessary litigation, we will not order Applicant to provide restitution to those ratepayers who were harmed by Applicant's actions.

Findings of Fact

1. The application appeared in the Daily Calendar on September 13, 2001.
2. No protests have been filed.
3. Applicant was authorized in D.97-06-037 to provide facilities-based and resold local exchange and interexchange services.
4. On August 31, 2001, Applicant mailed a notice its customers stating that service would cease on September 30, 2001.
5. The notice requirements in D.97-06-096 for advice letter filings are useful as a guide in this proceeding.
6. Applicant's August 31, 2001 notice did not satisfy the notice requirements in D.97-06-096 because Applicant was not authorized to discontinue service on the date specified in the notice.
7. Pursuant to General Order (GO) 96-A, Section XIV, Applicant is required to continue to provide local exchange service until its withdrawal is approved by the Commission.

8. Applicant's notice indicated that service would be discontinued on the date specified therein, and did not indicate that Applicant may not discontinue service unless and until its request is approved by the Commission.

9. Applicant's violations are similar to Verizon's violations addressed in D.01-06-036 because it sent misleading notices to its customers that led them to believe that service would be automatically terminated after a specified date.

Conclusions of Law

1. A hearing is not necessary.
2. Applicant's notice was misleading.
3. Applicant's customers were misled into transferring to other carriers.
4. Applicant's former customers could not have been required to switch to another carrier prior to the effective date of this decision.

5. Applicant effectively withdrew from providing local exchange service to its customers without the Commission's advance approval in violation of GO 96-A Section XIV, and Pub. Util. Code § 702.

6. Section 362(a)(1) of the Bankruptcy Code prohibits the Commission from commencing or continuing any "judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of that case under this title."

7. The filing of a bankruptcy petition operates as a stay applicable to all entities, of "the commencement or continuation of a judicial, administrative, or other action or proceedings against the debtor.

8. The general policy behind the stay is to grant complete and immediate, albeit temporary, relief to the debtor from creditors and to prevent dissipation of the debtor's assets before orderly distribution to all creditors can be affected."

9. A main purpose of the stay is to protect the priority of payments to creditors.

10. Section 362(b)(4) provides that the filing of a petition does not stay “the commencement or continuation of an action or proceeding by a governmental unit...to enforce such governmental unit’s...police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in a an action or proceeding by the governmental unity to enforce such governmental unit’s...police power.”

11. Section 362(b)(4) permits a governmental unit such as the Commission to “commence or continue any police or regulatory action, including one seeking a money judgment, but it may enforce only those judgments and orders that do no require payment or authorize the government to exercise control over property of the estate.

12. The exemption allows these proceedings to continue so that the bankruptcy court does not become a “haven for wrong doers.”

13. The U.S. Ninth Circuit Court of Appeals applies two tests for determining whether a state’s actions falls within the scope of Section 362(b)(4): the pecuniary purpose test and the public policy test.

14. Under the pecuniary purpose test, the court must determine “whether the government action relates primarily to the protection of the government’s pecuniary interest in the debtor’s property or to the matters of public safety and welfare.”

15. The relevant inquiry is whether the action is being pursued “solely to advance a pecuniary interest of the governmental unit,” in which case the stay will be imposed.

16. Such actions have been described as those that would “result in an economic advantage to the government or its citizens over third parties in relation to the debtor’s estate.”

17. Courts apply the “public policy” test in order to “distinguish between government actions that effectuate public policy and those that adjudicate private rights.”

18. The legislative history of Section 362(b)(4) and case law establish that consumer protection is a valid exercise of the police and regulatory power for purposes of this section.

19. The action we are taking herein is primarily concerned with consumer protection, and does not conflict with any purpose of federal bankruptcy law.

20. A strong case can be made that the restitution order set forth in the DD falls within the exception set forth in Section 362(b)(4).

21. In order to avoid unnecessary litigation in Bankruptcy Court, we will not order Applicant to provide restitution to those ratepayers who were harmed by Applicant’s actions.

22. This order should be made effective immediately so that Applicant can complete its cessation of operations as soon as possible.

O R D E R

IT IS ORDERED that:

1. The application of FirstWorld Orange Coast (Applicant) to withdraw from the provision of local exchange and interexchange services is granted, and its Certificate of Public Convenience and Necessity to provide local exchange and interexchange service is revoked.

2. This application is closed.

This order is effective today.

Dated May 16, 2002, at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

CARL W. WOOD

GEOFFREY F. BROWN

MICHAEL R. PEEVEY

Commissioners